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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1208

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
PETITIONER,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Cases

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28 United States Code § 1255(1)	1
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The petitioner prays that a writ of certiorari issue to the United States Court of Claims to review the judgment entered in this case on January 17, 1966.

Opinions Below

The opinion of the Court below in this case (Appendix A, *infra*, pp. 5-6) was not reported.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S. Code §1255(1).

The order of the Court of Claims denying the petitioner's motion to dismiss and granting the petitioner's motion for summary judgment was entered on January 17, 1966.

Questions Presented

Whether the United States may set off its claim for taxes due from a government contractor against the contractor's surety which has paid persons supplying labor and materials for the contract and which is otherwise entitled to be paid the balances due on the contract and held by the United States.

Statutes Involved

There do not appear to be any particular statutes or constitutional provisions involved in this case, other than those establishing jurisdiction in this Court and in the Court of Claims.

Statement

This is a case brought in the Court of Claims by the petitioner, The Fidelity and Casualty Company of New York, as surety for a certain contractor, Meco, Inc., to recover the balance of certain contract funds being held by the United States. The contract, designated No. AF 17(600)-2007, was for the Repair of Hot Water Mains at Loring Air Force Base in Maine. Meco, Inc., was the principal contractor. Meco, Inc., failed to pay certain laborers, materialmen and subcontractors who furnished labor and materials in the performance of the contract. Pursuant to the terms of its bond, issued under the provisions of Title 40, Sections 270 a-e (the Miller Act, so-called) the petitioner paid the full penal sum of its bond $84,056.50 to satisfy the claims of these laborers, materialmen and subcontractors. The United States is holding the sum of $20,590.76 representing the

balance contract funds. In its amended answer to the petitioner's petition in the Court of Claims, the United States set up as an "Affirmative Defense of Set Off and/or Counterclaim" its claim for certain withholding taxes, Federal Unemployment Taxes and penalties due from Meco, Inc., to the United States. The petitioner filed a motion to dismiss the counterclaim of the United States on the ground that such a claim could not be set off against its claim against the United States for the contract balances. The petitioner's motion to dismiss was denied in an order of the Court of Claims of January 17, 1966. It is this order which the petitioner seeks to have reviewed by this Court. (The order also granted the petitioner's motion for summary judgment, establishing that the petitioner was entitled to be paid the contract balances involved less the amount of the set-off. Petitioner does not seek review of the decision on the motion for summary judgment.)

Reasons for Granting the Writ

United States v. *Munsey Trust Co.*, 332 U.S. 234 (1947) has been thought to stand for the proposition that the United States did have the right to set off against contract balances in its possession amounts due it from a contractor for taxes and the like even though it is the surety, rather than the contractor, who is entitled to those contract balances by virtue of the surety's having paid laborers and materialmen. The decision in *Pearlman* v. *Reliance Insurance Company*, 371 U.S. 132 (1962) seems to cast doubt on that conclusion. In *Pearlman* a surety was permitted to recover the balance contract funds which had been paid to the contractor's trustee in bankruptcy, the Court holding that the surety was subrogated to the rights of the laborers and materialmen which it had paid. This very argument was advanced by the surety in *Munsey* and was rejected by the Court in that decision (332 U.S. at 240-242). The fact

that the argument has now been approved by this Court in *Pearlman* would suggest that the grounds advanced in *Munsey* to establish the surety's right to the funds are now approved by the Court. Other arguments advanced in *Munsey* are expressly or by implication adopted by either the majority or concurring opinions in *Pearlman*, for example, that the surety was also subrogated to the right of the United States to assure the performance of the contractor's obligations and that a contract existed under the terms of which the government agreed that retained funds of the contract would be available for the payment of claims and that the use of these funds for other purposes would constitute a breach of contract. The relationship between *Pearlman* and *Munsey* is very important in the law of suretyship. The question is "an important and recurring one." (371 U.S. at 135).

Conclusion

As indicated above, the decision of the Court of Claims in the instant case raises a question of general importance in the law of suretyship, particularly as it relates to contracts with the United States, which ought to be reviewed by this Court, especially in view of what has been taken to be a conflict between the reasoning in the *Munsey Trust* Case and the reasoning in the later case of *Pearlman* v. *Reliance Insurance Company*. For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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JOHN W. BALLOU

April 1966.

Appendix A

IN THE UNITED STATES COURT OF CLAIMS

No. 185-63

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, PLAINTIFF;
IRVING MARMER, RECEIVER FOR MECO, INC., AND ROCKLAND TRUST COMPANY, THIRD PARTY PLAINTIFFS.

v.

THE UNITED STATES

ORDER

This case comes before the court on motion of the plaintiff, The Fidelity and Casualty Company of New York, filed April 29, 1965, to dismiss the affirmative defense of set-off and/or counterclaim contained in defendant's first amended answer, and its motion, filed May 3, 1965, for summary judgment. Upon consideration thereof, together with the opposition thereto of the defendant, it appears to the court that the third-party plaintiffs, Irving Marmer, Receiver for Meco, Inc., and Rockland Trust Company, have filed no responses thereto and that the times for so doing pursuant to the Rules of the court have expired. Without oral argument, it is concluded on the basis of *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947), *reversing Munsey Trust Co.* v. *United States*, 107 Ct. Cl. 131, 67 F. Supp. 976 (1946), that plaintiff's said motion to dismiss should be denied. It is further concluded, on the basis of *Pearlman* v. *Reliance Insurance Company*, 371 U.S. 132 (1962), that plaintiff is entitled to recover on that portion of its motion for summary judgment referred to as a partial summary judgment for the total "retainages" less defendant's

set-off and/or counterclaim and that the third-party plaintiffs are not entitled to recover.

IT IS, THEREFORE, ORDERED that plaintiff's said motion to dismiss, filed April 29, 1965, be and the same is denied, that plaintiff's motion for summary judgment be and the same is granted in part in accordance herewith and judgment is entered to that effect, and the case is returned to the trial commissioner for further proceedings pursuant to Rule 47(c)(2).

IT IS FURTHER ORDERED that as to the third-party plaintiffs, the action is dismissed.

By the Court

WILSON COWEN
Chief Judge

Jan 17 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1208

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a surety, was called upon under its Miller Act bond to pay approximately $84,000 to certain laborers and materialmen of a defaulting government contractor. The United States, pursuant to the terms of the contract, had retained a percentage of the contract price due the contractor. The surety filed suit in the Court of Claims against the United States to recover the retained amount, whereupon the United States claimed a setoff for unpaid federal taxes due from the contractor. Relying upon *United States* v. *Munsey Trust Co.*, 332 U.S. 234, the court denied the surety's motion to dismiss the setoff claim and awarded the surety only the balance of the amount

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retained by the government after deducting the amount of the setoff (Pet. 5–6).

The decision of the Court of Claims is correct. As petitioner recognizes (Pet. 3), it flows directly from *United States* v. *Munsey Trust Co.*, *supra*, where this Court held that the United States was entitled to set off against the surety (who had paid laborers and materialmen) a debt owed to the government by the contractor, although that debt arose from a wholly separate and independent transaction.

Petitioner, however, contends that the *Munsey* case was overruled by *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132. In *Pearlman*, the government, having no further claim against the contractor, paid the retained amount over to the contractor's bankruptcy trustee. Thus the case did not involve the government's right of setoff, but only the competing rights of the surety and the contractor's general creditors once the government had released the retained fund. The Court expressly recognized that *Munsey* involved the separate issue of the government's right to set off its claims against the fund and that, in *Munsey*, "[w]e held that the Government could exercise the well-established common-law right of debtors to offset claims of their own against their creditors" (371 U.S. at 140). The Court in *Pearlman* did not purport to disturb this rule.[1] Changes in the *Munsey* result

[1] See also *United Pacific Insurance Co.* v. *United States*, 319 F. 2d 893, 894–895 (Ct. Cl.), where the parties conceded, and the Court of Claims agreed, that, upon the authority of *Munsey*, the United States was entitled to a set off against the retained fund for the contractor's unpaid federal tax liabilities, and that only the balance of the fund in excess of the government's claims was subject to the claims of the surety or trustee under *Pearlman*.

have been made by Congress only in a limited situation not applicable here. Cf. *Central Bank* v. *United States*, 345 U.S. 639, 642–643.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.

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